

RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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REC'D TN
REGULATORY AUTH.

99 MAY 21 PM 2 44

OFFICE OF THE
EXECUTIVE SECRETARY

May 20, 1999

VIA FEDERAL EXPRESS

Jerry C. Colley, Esq.
Colley & Colley
710 North Main Street
Suite 200
Columbia, TN 38401

**In re: Show Cause Proceeding Against Minimum Rate Pricing, Inc.
Docket #98-00018**

Dear Mr. Colley:

Enclosed is an original MRP's Petition for Reconsideration of the May 11, 1999 Order which you may use for your files. In the instance, however, that our federal express package to the TRA does not get there in time, we may ask you to copy this original and use it for filing purposes. Hopefully, we will not need to call you to ask you to do this.

If you have any questions, please call me or Sarah.

Sincerely,



Adrienne M. Bauer
Legal Assistant

/amb

enclosure

cc: Sarah B. Colley, Esq.

REC'D TN
REGULATORY AUTH.
BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

99 MAY 21 PM 2 44

IN RE:

SHOW CAUSE PROCEEDING
AGAINST MINIMUM RATE PRICING,
INC.

) OFFICE OF THE
) EXECUTIVE SECRETARY
) **DOCKET NO.:98-00018**
)
)
)

**MINIMUM RATE PRICING, INC.'S PETITION
FOR RECONSIDERATION OF MAY 11, 1999 ORDER**

Minimum Rate Pricing, Inc. ("MRP"), by and through its undersigned counsel, respectfully files this Petition for Reconsideration of the Order entered by the Authority on May 11, 1999, stating as follows:

On May 11, 1999 the Authority entered an Order which:

1. Stated that the Authority affirmed the Notice of Revocation of Certification of Minimum Rate Pricing, Inc. dated April 27, 1999;
2. Stated that "[t]he Authority shall take the necessary steps to identify the intrastate long distance customers formerly services by Minimum Rate Pricing, Inc.;" and
3. Stated that "[a]ny party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from the date of this Order."

For reasons unknown to MRP and its counsel, neither MRP nor its counsel became aware of the existence of the May 11, 1999 Order until the afternoon of May 17, 1999 when counsel for MRP, Walter E. Diercks, telephoned attorney for the staff of the Authority, Gary Hotvedt, Esq. to inquire as to whether an order had ever been issued by the Authority. Counsel for MRP contacted Mr. Hotvedt after he had telephoned the Authority's Executive Secretary, K. David Waddell, on May 14, 1999 and May 17, 1999 and left voice mail messages for Mr. Waddell which were not returned.¹

When counsel for MRP telephoned Mr. Hotvedt and inquired about whether the Authority

¹ As of the close of business on May 20, 1999, Mr. Waddell has still not returned these two voice mail messages.

had ever issued an order, he was informed by Mr. Hotvedt that Authority had issued an order on May 11, 1999. Mr. Hotvedt graciously faxed a copy of the May 11 Order to counsel for MRP shortly after 2:30 pm. CDT on May 17, 1999. As of the close of business on May 20, 1999, neither MRP nor its counsel has received a copy of the May 11, 1999 Order from the Authority, in addition to the copy faxed by Mr. Hotvedt to MRP's counsel on May 17, 1999 after counsel for MRP made an inquiry to Mr. Hotvedt.

The apparent failure of the Authority's Executive Director to serve a copy of the May 11, 1999 Order on MRP or its counsel has severely hampered MRP's ability to file a timely Petition for Reconsideration and has significantly impaired MRP's due process rights. Despite the lack of timely notice of the issuance of the May 11, 1999 Order, MRP states the following in support of its Petition for Reconsideration:

1. The Authority's April 29, 1999 decision to revoke the certification of Minimum Rate Pricing, Inc. is in error because it is not supported by either the facts or the law. MRP respectfully refers the Authority to MRP's Proposed Findings of Fact and Conclusions of Law for a fuller exposition of the correct legal and factual analysis that the Authority should have followed in deciding this matter.

2. The Commission's decision to revoke MRP's certification to provide *intrastate* long distance telecommunications services constitutes an illegal attempt by the Authority to regulate *interstate* long distance telecommunications services in violation of the Communications Act's preemption provisions. That preemption also has the effect of prohibiting the Authority and other state agencies from exercising jurisdiction over the *interstate* activities of a reseller. The *interstate* and *intrastate* aspects of the provision of long distance telephone service are so "inextricably intertwined" that binding Federal precedent mandates that federal law preempts all state regulation concerning the switching of a telephone subscriber's long distance provider. The preemptive effect of the Communications Act is described in detail in MRP's Proposed Findings of Fact and Conclusions of Law and will not be repeated here.

3. The Attorney General of Tennessee has participated in this proceeding as an intervenor and also has purported to represent and speak for the Authority in this proceeding. These dual and inconsistent roles were pointed out to the Authority in an April 13, 1999 letter to K. David Waddell; the April 5, 1999 letter from Kathleen Ayres which evidences the Attorney General's dual and inconsistent roles was attached as Exhibit 1 to the April 13, 1999 letter. The Attorney General's representation of the Authority in a proceeding before the Authority in which the Attorney General is an intervenor constitutes an impermissible conflict of interest and has fatally infected this entire proceeding.

4. The Attorney General and the Authority apparently had *ex parte* communications about matters on which the Authority later made rulings. These apparent *ex parte* communications were pointed out to the Authority in an April 13, 1999 letter to K. David Waddell; the April 5, 1999 letter from Kathleen Ayres which evidences these facts was attached as Exhibit 1 to the April 13, 1999 letter. The apparent *ex parte* communications between the Attorney General and the Authority regarding matters to be considered and ruled on by the Authority in a proceeding before the Authority in which the Attorney General is an intervenor has fatally infected this entire proceeding.

5. The Authority decided this matter on April 27, 1999 despite the fact that the instant Show Cause proceeding has been automatically stayed by Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362. *Fugazy Express, Inc. v. Shimer*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992). Any issue regarding the scope and effect of the automatic stay and any request for relief from the automatic stay must be presented to and resolved by the United States Bankruptcy Court for the District of New Jersey, Newark Division.

6. As set forth above, the May 11, 1999 Order of the Authority apparently was never served on MRP or its counsel by the Authority's Executive Secretary. Counsel for MRP only discovered the existence of the May 11, 1999 Order after he called the attorney for the Authority staff, Gary Hotvedt, on May 17, 1999 after two attempts to contact the Executive Secretary by telephone did not elicit any response from the Executive Secretary. This apparent failure by the Authority to serve

an Order with a ten day requirement for filing a Petition for Reconsideration has severely hampered MRP's ability to file a timely and complete Petition for Reconsideration and constitutes a denial of MRP's due process rights.

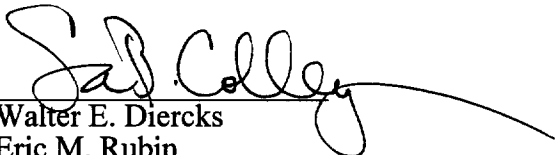
7. At the Authority's April 27, 1999 meeting where it considered the instant matter, the Authority improperly considered allegations made against MRP and an MRP witness, Drew Keena, in a document filed by the Attorney General on March 25, 1999 entitled "Motion for Exercise of Regulatory Police Power to Protect the Public Interest." By way of illustration, the Authority clearly relied on the allegations in this March 25, 1999 filing by the Attorney General to determine the credibility of Mr. Keena. The consideration of and reliance on allegations and "evidence" proffered by the Attorney General after the close of the hearings and the close of the evidentiary record was improper and a denial of MRP's due process rights.

For the foregoing reasons, Minimum Rate Pricing, Inc. respectfully moves that the Authority reconsider 1) its April 27, 1999 action revoking the certification of Minimum Rate Pricing, 2) its April 27, 1999 Notice of Revocation of Certification of Minimum Rate Pricing, Inc. (the "Notice of Revocation") and 3) its May 11, 1999 Order affirming the April 27, 1999 Notice of Revocation and that the Authority 1) rescind its April 27, 1999 action revoking the certification of Minimum Rate Pricing, Inc., 2) rescind its April 27, 1999 Notice of Revocation, and 3) vacate its May 11, 1999 Order. The Authority should then submit the question of whether the instant proceeding is subject to the automatic stay to the United States Bankruptcy Court for the District of New Jersey, Newark Division for resolution. If, after granting the relief set forth in above, the Authority continues to assert jurisdiction over this matter despite the automatic stay, the Authority should at the very least: 1) dismiss the Consumer Advocate Division of the Office of the Attorney General of Tennessee (the "CAD") as an intervenor because of the conflict of interest and the *ex parte* communications described above, 2) exclude from consideration any evidence submitted by the CAD in this matter, 3) exclude from consideration any testimony adduced by the CAD at the hearing in this matter, 4) exclude from consideration any oral argument or written pleading submitted by the CAD in this

proceeding, and 5) render a decision that the record does not establish that MRP engaged in material violations of Authority Rules that require the revocation of MRP's Certificate of Authority or the imposition of substantial fines.

Dated May 20, 1999

Respectfully submitted,

By: 
Walter E. Diercks
Eric M. Rubin
Sarah B. Colley, Tenn. BPR #17302
Rubin, Winston, Diercks,
Harris & Cooke, L.L.P.
1333 New Hampshire Ave., N.W., Ste. 1000
Washington, D.C. 20036
Telephone: 202.861.0870
Counsel to Minimum Rate Pricing, Inc.

Jerry C. Colley, Tenn. BPR #2375
Colley and Colley
P.O. Box 1476
Columbia, TN 38401
Telephone: 931.388.8564
Local Counsel for Minimum Rate Pricing, Inc

CERTIFICATE OF SERVICE

I, Sarah B. Colley, Attorney for MRP, do hereby certify that I have sent a copy by first class, postage pre-paid through the U.S. Mail to Gary Hotvedt, Esq., Attorney for the Staff of the Tennessee Regulatory Authority and L. Vincent Williams for the Consumer Advocate Division of the Office of the Attorney General of Tennessee. This the 20th day of May, 1999.

A handwritten signature in black ink, appearing to read "S.B. Colley", with a long, sweeping horizontal line extending to the right.

- Faked**RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, L.L.P.**

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FAX: (202) 429-0657

May 21, 1999

REC'D TN
REGULATORY AUTH.OFFICE OF THE
EXECUTIVE SECRETARY**By Facsimile and First Class U.S. Mail**

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

**Re: Docket No. 98-00018
Minimum Rate Pricing, Inc.'s Petition
for Reconsideration of May 11, 1999 Order**

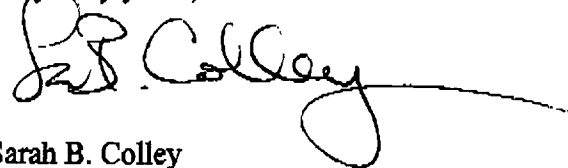
Dear Mr. Waddell:

Attached is Minimum Rate Pricing, Inc.'s Petition for Reconsideration of May 11, 1999 Order. This document was sent yesterday to the Authority by Federal Express for morning delivery today. Federal Express has informed us that it attempted to deliver the Petition to the Authority's offices this morning at 9:34 am and that there was no one present to sign for the package. I informed you of this delivery problem and you told me that I should fax the document to you for filing.

We have requested Federal Express to reattempt to deliver the package to the Authority before the close of business today. When the original Petition is delivered to the TRA, I request that your office file stamp the designated copy of the Petition with today's date and return it to me in the addressed and postage pre-paid envelope included with the Petition.

Thank you for your attention to this matter. Please contact me or Walter Diercks if you have any questions.

Very truly yours,



Sarah B. Colley

cc: L. Vincent Williams, Esq. (by first class U.S. Mail without attachment)
Gary Hotvedt, Esq. (by first class U.S. Mail without attachment)

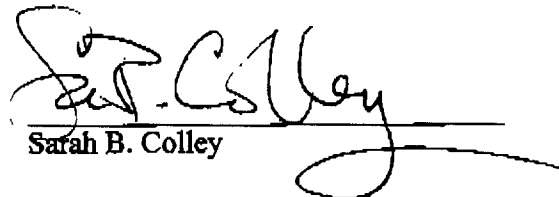
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing letter and Petition were sent on May 21, 1999 by facsimile to Mr. K. David Waddell, Executive Secretary, Tennessee Regulatory Authority, at 615-741-5015, and was served on the following parties by depositing a copy of the aforesaid in the United States mail, postage pre-paid on May 21, 1999:

Gary Hotvedt, Esq.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

L. Vincent Williams, Esq.
Deputy Attorney General-Consumer Advocate
Consumer Advocate Division
Second Floor
425 Fifth Avenue, North
Nashville, TN 37243

Rochelle Weisburg, Esq.
Angel & Frankel, P.C.
460 Park Avenue
New York, NY 10022-1906


Sarah B. Colley

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

REC'D TN
REGULATORY AUTH.

IN RE:

SHOW CAUSE PROCEEDING
AGAINST MINIMUM RATE PRICING,
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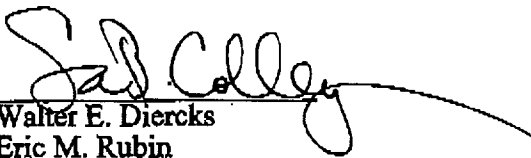
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Dated May 20, 1999

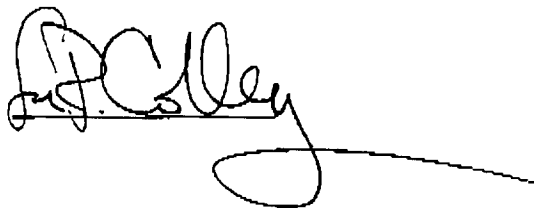
Respectfully submitted,

By: 
Walter E. Diercks
Eric M. Rubin
Sarah B. Colley, Tenn. BPR #17302
Rubin, Winston, Diercks,
Harris & Cooke, L.L.P.
1333 New Hampshire Ave., N.W., Ste. 1000
Washington, D.C. 20036
Telephone: 202.861.0870
Counsel to Minimum Rate Pricing, Inc.

Jerry C. Colley, Tenn. BPR #2375
Colley and Colley
P.O. Box 1476
Columbia, TN 38401
Telephone: 931.388.8564
Local Counsel for Minimum Rate Pricing, Inc

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A handwritten signature in black ink, appearing to read "S. B. Colley", is written over a horizontal line. A long, sweeping horizontal stroke extends to the right from the end of the signature.

RUBIN, WINSTON, DIERCKS, HARRIS & COOKE, L.L.P.
ATTORNEYS AT LAW

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TELEPHONE (202) 861-0870 FAX (202) 429-0657

FAX TRANSMISSION COVER SHEET

Confidentiality Notice

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TO: K. David Waddell, Esq.
Executive Secretary of the TRA

FAX #: (615) 741-5015

CONF. #: (615) 741-2904

FROM: Sarah B. Colley, Esq.

DATE: May 21, 1999

PAGES: 9 including coversheet.

COMMENTS:

If a problem of clarity of transmission arises, please call Adrienne at (202) 861-0870.